

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP878

STATE OF WISCONSIN

Cir. Ct. No. 1994CF940663

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY TERRILL KIMBER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Anthony Terrill Kimber, *pro se*, appeals from an order denying his motion for postconviction relief. Kimber's motion was based on the alleged ineffectiveness of his postconviction counsel for not pursuing a claim of trial counsel ineffectiveness. Kimber claims his trial counsel performed

ineffectively by not pursuing a motion to dismiss based upon the lack of subject matter and personal jurisdiction. The postconviction court concluded that Kimber's jurisdictional arguments were without merit. As such, it held that neither trial counsel nor postconviction counsel provided ineffective assistance. We affirm.

BACKGROUND

¶2 In 1994, a jury convicted Kimber of two counts of first-degree intentional homicide, arson of a building, and three counts of first-degree recklessly endangering safety, as a habitual criminal. *See State v. Kimber*, No. 1995AP2420-CR, unpublished slip op. at 1-2 (WI App June 25, 1996). On direct appeal, Kimber claimed the circuit court erred in excluding lay and expert testimony regarding his mitigating defense of adequate provocation and loss of self-control. *Id.* at 2. We affirmed. *See id.* The Wisconsin Supreme Court denied review.

¶3 Eighteen years after his conviction, Kimber, *pro se*, filed a postconviction motion pursuant to WIS. STAT. § 974.06 (2011-12)¹ and *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). The postconviction court denied the motion, and this appeal follows.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DISCUSSION

¶4 Kimber claims his trial counsel provided ineffective assistance for failing to seek dismissal based on the lack of subject matter and personal jurisdiction.

¶5 The parties agree that the circuit court's subject matter jurisdiction in a criminal case attaches when the criminal complaint is filed. *See State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994); *see also* WIS. STAT. § 968.02(2) ("After a complaint has been issued, it shall be filed with a judge and either a warrant or summons shall be issued or the complaint shall be dismissed, pursuant to [WIS. STAT. §] 968.03. Such filing commences the action."). The crux of Kimber's claim is that the complaint in this matter was never filed.

¶6 Kimber submits that copies of the criminal complaint that were provided to him by the clerk of the circuit court and the clerk of the court of appeals do not include a file stamp. However, as detailed in the postconviction court's decision, the record copy does. In this regard, the postconviction court explained that "[t]he back of the last page of the complaint contains the file stamp of the clerk of circuit court and the date February 25, 1994," and our review confirms this. On this issue, we agree with the State's reasoning:

The State has no reason to doubt Kimber. Nor does it know why Kimber's copies do not bear the file stamp—whether the clerks failed to copy the back of the last page or whether the purple file stamp did not photocopy properly.

What matters, though, is not whether Kimber's copies bear the clerk's file stamp but that the criminal complaint in the court record does. Because the record includes a copy of the criminal complaint that is stamped "COURT COPY" on the first page and that bears the clerk of court's file stamp on the reverse of the last page,

Kimber's claim that the circuit court lacked subject matter jurisdiction fails.

(Record citations omitted.)

¶7 Next, Kimber claims that trial counsel provided ineffective assistance for failing to seek dismissal based on the lack of personal jurisdiction. Again, this jurisdictional claim is premised on his belief that the complaint was not properly filed. But, this is not the proper standard when it comes to personal jurisdiction. “‘Personal jurisdiction in a criminal case attaches by an accused’s physical presence before the court pursuant to a properly issued warrant, a lawful arrest or a voluntary appearance, and continues throughout the final disposition of the case.’” *State v. Dietzen*, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991) (citation omitted). Here, Kimber appeared before the circuit court as a result of his arrest, and he does not argue that the arrest was unlawful. Consequently, there is no basis for this claim.

¶8 Given our determination that Kimber’s jurisdictional claims lack merit, counsel was not ineffective. *See State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (Counsel’s failure to raise a legal challenge is not deficient if the challenge would have been rejected.); *see also State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (To show that postconviction counsel was ineffective for not challenging trial counsel’s performance and thus be entitled to relief, defendant must demonstrate that trial counsel actually was ineffective.).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

